United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2010

To be argued by
ALAN SCRIBNER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-2010

UNITED STATES ex rel. Nancy Rosner, on behalf of
FRANK CIAPPETTA,

Appellant,

—v.—

WARDEN, Sing Sing Prison, Ossining, New York,

Appellee.

APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES ex rel. Nancy Rosner, on behalf of FRANK CIAPPETTA,

Appellant,

v. Docket No. 75-2010

WARDEN, Sing Sing Prison, Ossining, New York,

Appellee.

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STATEMENT OF THE CASE

I.

Background

The appellant, at the time a 17 year-old boy, was indicted in the Bronx County Court on June 15, 1954 along with other youths -- Vincent Guglielmelli, Philip Bonanno, Jerry Santaniello and Frank Giampetruzzi -- for murder in the first degree. The indictment alleged that the five defendants, acting in concert, shot and killed one Ernest Montuoro on June 1, 1954. On May 2, 1955, while their trial was in progress, the appellant pleaded guilty to murder in the second degree, while the other defendants pleaded guilty to first degree manslaughter. On June 24, 1.55 Ciappetta and Guglielmelli were sentenced to the mandatory term of twenty years to life imprisonment (former Penal Law §1048), while Bonanno and Giampetruzzi were sentenced

to 2-1/2 to five years. Santaniello received a 5 to 10 year term.

The Coram Nobis Hearing

In November 1955 a coram nobis hearing was held to inquire into the circumstances of the plea.

Stephen Fuschino, an attorney, testified that he represented both the appellant Ciappetta and his co-defendant Guglielmelli (A-85).* Prior to trial and during the selection of the jury Fuschino discussed a disposition of the case with the district attorney and was told that the prosecutor would recommend acceptance of a plea to murder in the second degree for both his clients (A-87). At a conference with Judge Schulz, the judge indicated he would accept such a plea (A-93). Mr. Fuschino told the judge that the family was concerned about the sentence, and the judge replied that he would make no promises (A-12). Mr. Fuschino then suggested that Ciappetta and Guglielmelli might be sentenced to the Elmira Reception Center for an indefinite term not to exceed five years, referring the Court to §2184a** of the Penal Law which concerned sentences for youths between the ages of 16 and 21 (A-94). The judge replied that he did not think he

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* References are to pages of appellant's appendix.

** Although left unexpressed at the hearing, the court's attitude regarding the unavailability of 2148a was undoubtedly based on the fact that Section 2184a on its face excluded crimes punishable by life imprisonment, and murder in the second degree carried a mandatory maximum term of life in prison.

could sentence the defendants "under those statutes" (A-94),* but told Mr. Fuschino that if he thought otherwise he should "look up the law on it." (A-95). At the next conference with the judge, the lawyer told him that he had "read the section" and felt such a sentence could be a legal one. It was suggested that the lawyer discuss it with Mr. Lee, an assistant district attorney (A-95). Mr. Lee felt it was not clear in his mind whether a 2184a sentence could be imposed and suggested contacting the warden of Elmira (A-95).

* The relevant statutes of the former Penal Law of the State of New York are:

§2184-a. Reformatory term for male persons

Where a male person between the ages of sixteen and twenty-one years is hereafter adjudicated a juvenile delinquent, or found to be a disorderly person or vagrant, or adjudged a wayward minor or youthful offender, or found guilty of any offense or of a misdemeanor, or of a felony, including crimes punishable with imprisonment for an indeterminate term having a minimum of one day and a maximum of his natural life, but excluding crimes punishable by death or life imprisonment, the trial court may, instead of sentencing him to imprisonment in accordance with the punishment provided by law for the crime or offense for which he was convicted, direct him to be confined in an institution under the jurisdiction of the department of correction without designating the name of such institution, and commit him to the department reception center for classification and transfer in accordance with the provisions of article three-A of the correction law. The term of imprisonment of any person sentenced hereunder shall be known as a reformatory term, and shall be terminated by the board of parole in the executive department, but in the case of any person convicted of a felony, such term shall not exceed five years and in the case of any person convicted for any other offense or for a misdemeanor, the term shall not exceed three years. Added L.1932, c. 414 § 2; amended L.1950, c. 525, § 20; L.1954, c. 803, § 44, eff. Feb. 1, 1955.

§1048. Punishment for murder in the second degree

Murder in the second degree is punishable by imprisonment under an indeterminate sentence, the minimum of which shall be not less than twenty years and the maximum of which shall be for the offender's natural life, under an original sentence for murder in the second degree, on the first day of September, nineteen hundred and seven, shall be deemed to be thereafter serving under such an indeterminate sentence. As amended L.1928, c. 32, eff. July 1, 1928.

At a subsequent conference with the court, the judge said he received a letter from the warden of Elmira but commented "he didn't like the letter...it was not to the point that he had in mind, as to whether or not it was a legal sentence" (A-96). The letter from the warden, read into the record (A-98), discussed the question of whether Guglielmelli could be sentenced under 2184a where he had committed the crime before he was sixteen years old, but sentenced after. The warden felt that the age problem would not render a 2184a sentence illegal (A-100). The judge gave the letter to Mr. Fuschino who then showed it to the Guglielmelli family, telling them that the defendant could receive a 20 years to life sentence or he could receive a five-year maximum sentence to Elmira under 2184a (A-103). Although the judge had told Mr. Fuschino that he did not believe a reformatory sentence could be imposed, and had said that he "didn't think it was a legal sentence" (A-103). Mr. Fuschino conveyed a different impression to the defendants and their families. He showed them the letter as proof that a reformatory sentence could be imposed, represented that the judge wanted to help the boys, and offered the letter as proof of the judge's attitude. Fuschino said, "You never heard of such a thing, that a judge would go out so far to try to help the boy...Here is a letter that he has received showing that such a sentence, if imposed, that the Elmira Reception Center would accept the boy...Although there is no promise here, there is a good chance, in view of his good background, he might get such a sentence" (A-104). Mr. Fuschino also told the appellant

Ciappetta and his family about the possibility of a 2184a sentence (A-108). Ciappetta, however, was reluctant to plead to murder in the second degree (A-109). He wanted a lower plea (A-109), because he was disturbed at the possibility of a 20-year to life sentence. It was only after many discussions among the appellant, the family, the lawyer and the other defendants, and only after Ciappetta received the lawyer's assurance that a 2184a sentence was possible that the appellant agreed to plead guilty to second degree murder (A-111).

Frank Ciappetta testified that he was then 17 years old and had never been in trouble before (A-127). He had refused to plead guilty to murder in the second degree (A-129)until Mr. Fuschino told him about the warden's letter and "told me about the five-year sentence" (A-128). His parents also told him that he might receive a five-year maximum sentence since Mr. Fuschino had so advised them (A-130). Ciappetta would not have pleaded guilty without the possibility of a five-year maximum sentence to Elmira (A-130).

Bessie Ciappetta, the appellant's mother, testified that Mr. Fuschino had told her that "all the boys will get five years" (A-135). Her son was reluctant to plead and pleaded guilty only "because he thought he will get five years" (A-136). Mrs. Ciappetta had told her son about the five-year possible sentence since Mr. Fuschino had told her about it (A-137) One of the other defendants, Giampetruzzim also did not want to take any plea, but

the others convinced him to take it because of the five-year sentence (A-135).

Vincent Guglielmelli testified that his mother told him that Mr. Fuschino said that if he pleaded to murder in the second degree he could receive a five-year maximum sentence (A-114). He was told he could get that sentence cince the judge had received a letter from Elmira "saying it was okay" (A-114).

Criscenza Guglielmelli, Vincent's mother, testified that Mr. Fuschino had first told her that the child would eventually be turned over to Children's Court (A-116). However, if he did not go to Children's Court, he would receive a five-year maximum sentence (A-121). When Fuschino showed her the letter from Elmira the lawyer said, "this is it; this is what we have been waiting for" (A-123). Then, Mrs. Guglielmelli testified, "I knew my boy was going to get a sentence of five-year maximum, and I wasn't afraid any more" (A-123). When he was sentenced to twenty years to life imprisonment, it was "a shock. We were frozen. We never expected that, never" (A-123).

Andrew C. McCarthy, the assistant district attorney in charge of the prosecution of this case, testified that he had a conversation with Mrs. Guglielmelli and Mrs. Ciappetta (A-145)and told them that there was a discussion going on between Mr. Fuschino and assistant district attorney Lee concerning the interpretation of §2184a (A-148). He did not, however, tell Mrs. Guglielmelli that her son would receive a five-year maximum sentence (A-145).

II.

Exhaustion

On December 6, 1955 Judge Schulz denied the coram nobis application (A-152).* Ciappetta filed a notice of appeal on January 13, 1956 (A-155). Subsequently, an agreement was made with the District Attorney, Bronx County, to the effect that the appeal in Ciappetta's case would be determined by the decision on appeal in the case of his co-defendant Vincent Guglielmelli. This agreement was expressed in affidavits filed by Ciappetta's attorney and submitted to the Appellate Division on November 12, 1956 (A-156), and January 4, 1957 (A-158). As stated in the November 12 affidavit:

> Your deponent is of the opinion that the facts, circumstances and law are identical in both appeals and your deponent has discussed this matter with the Appeals Bureau of the District Attorney's Office: Bronx County and it has been agreed by and between us that the decision of the case of VINCENT GUGLIELMELLI shall be binding upon the Appellant herein. (Emphasis supplied)

Subsequently the order of the County Court denying coram nobis was affirmed. People v. Guglielmelli, 170 N.Y.S.2d 986 (1st Dept. 1958). Leave to appeal to the Court of Appeals by Guglielmelli was denied by Judge Stanley H. Fuld on March 13, 1958.

This habeas corpus petition was commenced in the Southern District of New York in April 1974. Judge Motley denied the petition without a hearing on September 30, 1974 (A-67). A

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* A second coram nobis application was denied without a hearing by Judge Schulz on April 10, 1960.

certificate of probable cause was granted on December 20, 1974 and a timely notice of appeal was filed (A-1). The appellant is still incarcerated pursuant to the judgment in issue here.

POINT I.

DUE PROCESS REQUIRES VACATING THE APPELLANT'S GUILTY PLEA SINCE IT WAS NEITHER KNOWINGLY NOR VOLUNTARILY ENTERED

The appellant, Frank Ciappetta, is presently serving a sentence of twenty years to life in prison as a result of his plea to murder in the second degree, entered in 1955 while he was 17 years old. That plea, however, was constitutionally defective.

At the time the penalty for murder in the second degree was the mandatory term actually imposed (former Penal Law §1048). Yet, the only reason Ciappetta overcame his reluctance to take the plea was because he received assurances from his attorney that he was eligible for and had a good chance to obtain a reformatory term in theElmira Reception Center for a maximum of five years. Such a term, he was told, could be imposed under former Penal Law §2184a, a statute allowing reformatory sentences for youths between the ages of 16 and 21. In actual fact, however, Section 2184a was, on its face, inapplicable to second degree murder, since the law specifically excluded crimes punishable by life imprisonment. Thus misled, and with reason to rely on his attorney's false representation, the appellant unknowingly invited the mandatory term he had strenuously sought to avoid. Due process therefore requires vacating the plea, since it was

made without knowledge of the consequences and was based upon the vision of a sentencing alternative which did not exist.

I.

It has, of course, always been the law that a plea unknowingly and involuntarily entered violates due process. If the plea is made without a full understanding of the consequences there can be no valid waiver of the important rights forfeited by the plea. As expressed by the Supreme Court in McCarthy v. United States, 394 U.S. 459 (1969):

> A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.
>
> 394 U.S. at 466

Similarly, in Boykin v. Alabama, 395 U.S. 238 (1969), the Supreme Court held that a plea of guilty must be "intelligent and voluntary." Ignorance or incomprehension does not allow an effective waiver, and full knowledge of the consequences of the plea is a prerequisite to a valid judicial admission of guilt.

While the requirements of McCarthy and Boykin -- that the face of the record must disclose that the plea was entered

with knowledge of its consequences -- is not retroactive (see, Halliday v. United States, 394 U.S. 831 (1969); United States ex rel. Rogers v. Adams, 435 F.2d 1372 (2d Cir. 1970)), the due process requirements of actual knowledge and voluntariness are, of course, applicable whenever the plea was entered. United States ex rel. Rogers v. Adams, supra, at 1375; Mosher v. United States, 491 F.2d 1346 (2d Cir. 1974); Wade v. Wainwright, 420 F.2d 898 (5th Cir. 1969); Grant v. United States, 451 F.2d 931 (2d Cir. 1971); Korenfeld v. United States, 451 F.2d 770 (2d Cir. 1971); People v. Nettles, 30 N.Y.2d 841 (1972); see also, Jones v. United States, 440 F.2d 466 (2d Cir. 1971); Bye v. United States, 435 F.2d 177 (2d Cir. 1970). In the present case the evidence presented at the 1955 coram nobis hearing affirmatively establishes the appellant's ignorance of the consequences of his plea at the time he entered it, since it is conceded that he was erroneously advised that a "minimum" sentence existed, which in fact did not.

In particular, the uncontradicted testimony establishes that Ciappetti was laboring under the false impression that there existed a sentencing alternative which could be granted him, namely, a reformatory term for youths at Elmira for 0-5 years. Moreover, judged by objective standards, the appellant was reasonably justified in his mistaken belief, since it was formed in reasonable reliance on his attorney's representations. Indeed, not only had his lawyer told him, his parents, and his

co-defendant, Guglielmelli, and his parents that the boys were eligible for the reformatory term, but the attorney had backed up his arguments by displaying a letter from the warden of the Elmira institution which had been sent to the judge. The letter opined that such a sentence could be imposed and that the Reception Center would accept the defendants if sentenced under 2184a. Added to this was Mr. Fuschino's own advice that the plea should be taken. What Ciappetta did not know, however, was that, contrary to his lawyer's representations, the judge felt that a 2184a sentence would be illegal and that the statute itself could not possibly apply to a plea to second degree murder. In other words, Ciappetta had a false view of the consequences of his plea, he was justified in relying on the false view, and he did rely on it, to his detriment. As he and his mother testified, the appellant would not have pleaded were it not for the possibility of the five-year maximum sentence. A plea taken under such circumstances is simply inconsistent with due process of law, as the cases indicate.

Thus, in Bye v. United States, supra, the defendant had been told by his attorney that if he pleaded to a crime carrying a 5-20 year term "he could be paroled in a couple of years" (435 F.2d at 178). In fact, as a narcotics offender, he was ineligible for parole under 26 U.S.C. §7237(d). The Second Circuit held that a hearing was necessary to test the voluntariness and knowledge of the pre-McCarthy, pre-Boykin plea, since Bye's ignorance that he was ineligible for parole "directly

affects the length of time an accused will have to serve in prison." "The danger is that the accused makes his decision to plead guilty underestimating by a factor of three the risk of prolonged mandatory incarceration. If the accused's ineligibility is known to him prior to entering his guilty plea, he may decide not to plead guilty at all in view of the greater perceived risks of lengthy imprisonment." 435 F.2d at 180. Accordingly, if a defendant can show that he was unaware of his ineligiblity for parole, and that he would not have pleaded guilty if he had known the true facts, the plea must be vacated no matter when it was entered (United States v. Welton, 439 F.2d 824 (2d Cir. 1971); Korenfeld v. United States, 451 F.2d 770 (2d Cir. 1971)). The present case is comparable, since Ciappetta pleaded under the impression created by his attorney that he was eligible for a five-year maximum reformatory term, while in fact, he was ineligible for such sentence. And he would not have pleaded had he known the real consequences. Indeed, since Ciappetta's ignorance concerned the minimum possible sentence and directly affected the length of time he would have to serve in prison, his plea was constitutionally invalid.

Similarly, in Jones v. United States, 440 F.2d 466 (2d Cir. 1971) the court held that knowledge of the maximum sentence was one of the consequences of a valid plea, citing two due process decisions, Wade v. Wainwright, supra, and Tucker v. United States, 409 F.2d 1291, 1295 (5th Cir. 1969) as authority. Obviously, knowledge of a mandatory minimum is equally a due

process requirement, since both are important consequences of a plea (see, People v. Nettles, supra). Here, Ciappetta was completely unaware that he had to receive the mandatory minimum and maximum proscribed for murder in the second degree, instead of banking his plea on the "good chance" his attorney said he had for a 0-5 year reformatory term.

Most recently, in United States ex rel. Leeson v. Damon, 496 F.2d 718 (1974), the Second Circuit granted §2254 relief to a youth who was told by his attorney that his plea to attempted grand larceny in the second degree would expose him to a sentence of 1.3 to 2.6 years in jail. The lawyer, however, overlooked that the defendant's age made him eligible for sentence to Elmira for an indefinite reformatory term of five years, the sentence which was eventually imposed. The court held:

> On the merits, this is not the kind of case that apparently the sentencing judge thought it was, that is to say, where a guilty plea was based on an erroneous prediction about sentence by counsel... Rather it is a case where the undisputed proof before the trial judge is that the defendant entered his plea in ignorance of what the maximum possible sentence was, believing it to be substantially less than that which the court was authorized to impose and which, indeed, it did impose.
>
> * * *
>
> Upon the facts in this case, appellant's plea was not knowing and was without an understanding of the law inasmuch as he did not know the maximum possible sentence he might receive. It is thus a plea entered in ignorance of its direct consequences, and it is therefore invalid.
>
> 496 F.2d at 721

Since Ciappetta, like Leeson, had no understanding

of the law in relation to the facts (Ibid.) and entered his plea "in ignorance of its direct consequences" due process requires vacating his plea in this case.

The district court specifically found that appellant had been incorrectly informed that a minimum five-year sentence was possible and pleaded guilty in the hope of receiving it (A-70):

> The minutes of the hearing coram nobis indicate that petitioner decided to plead guilty on the hope of being sentenced to the Elmira Reception Center for a maximum of five years. (Minutes, pp. 21, 22 and 47). That is, petitioner and Guglielmelli were led to believe that due to their age a reformatory sentence was a possible sentencing alternative (Minutes, pp. 26, 27 and 48.), whereas due to the gravity of the offense, such alternative was not possible (Former N.Y. Penal Law §1048).

The district court then denied appellant's claim that his plea was involuntary because made wihtout knowledge of its consequences by holding that a "minimum" sentence is not a consequence of the plea (A-73):

> For petitioner's argument that his plea was involuntarily entered to be persuasive, the court would have to accept the proposition that voluntariness and knowledge of the consequences of a plea can only be satisfied if the defendant knows both the maximum and minimum time that might be served in satisfaction of the judgment. This the court declines to do. It is well established that the "maximum" sentence one might get is a consequence about which, under due process standards, a defendant must be informed. Marvel v. United States, 380 U.S. 262 (1965)(per curiam), United States ex rel. Leeson v. Damon, 496 F.2d 718 (2d Cir. 1974). Jones v. United States, 440 F.2d 466 (2d Cir. 1971) (similarly under Fed.R.Crim.P., Rule 11). Research fails to uncover any authority for petitioner's proposition that knowledge of the minimum is equally essential. The absence of cases is logically the result of the weakness of the claim -- defendants petition for redress when they are sentenced to more time than they thought possible, not less.

On February 10, 1975 this Court held that a "minimum" sentence is a consequence of a plea. United States ex rel. Hill v. Ternullo, ___ F.2d ___, slip op. at 1755 (Feb. 10, 1975). In that case the district court denied habeas corpus relief without a hearing over petitioner's claim that he had been misadvised concerning the amount of time he would spend in jail as a result of a minimum sentence. The district court held that if petitioner's retained attorney was mistaken concerning the operation of the minimum sentence, this did not render the plea unconstitutional. This Court held that view erroneous:

> On the other hand, if Hill was confused about the minimum period of his incarceration, Leeson also controls: Misinformation about a statutory minimum is no less demonstrative of counsel's incompetence, nor necessarily less significant to a defendant's decision to plead guilty, than an error about a statutory maximum. In both instances, counsel is not being second-guessed about a prediction which has proven inaccurate but, rather, for a misstatement of easily accessible fact.
>
> On the record beforeus, however, we hesitate to rule on the merits of the petition. Because of its erroneous view of the law, the district court did not attempt to resolve the petitioner's understanding of the sentence consequences when he pleaded guilty. If it finds that the petitioner' plea was made without understanding of the minimum or maximum sentence possibilities, the district court must issue the writ or grant other appropriate relief, see Leeson, supra, 496 F.2d 718 at 722. (Emphasis supplied)

(Id. at 1761-2

In this case the record is crystal clear as the district court found, that appellant was misadvised concerning the minimum sentence and relied to his detriment. Thus, the writ must issue here.

POINT II.

APPELLANT'S PLEA MUST BE VACATED BECAUSE HIS ATTORNEY MISREPRESENTED THE COURT'S VIEW OF THE LEGALITY OF A REFORMATORY SENTENCE

In Mosher v. United States, 491 F.2d 1346 (2d Cir. 1974) a state defendant pleaded guilty in 1964 in reliance upon his lawyer's representation that the judge has promised a 15-16 sentence. That representation was false, and the Second Circuit held that as a result the plea was not knowingly or voluntarily entered.* Here, a similar false representation was made by counsel, and was reasonably relied upon by the appellant when he entered his plea. For throughout the conference between Mr. Fuschino and the court, Judge Schulz consistently expressed his belief that a §2184a sentence was illegal and could not be imposed (A-94,103). He reiterated his feeling upon receipt of the warden's letter, specifically telling counsel "I don't like it," the letter "was not to the point" of "whether or not it was a legal sentence" (A-96). Though Mr. Fuschino testified that he personally believed that a §2184a sentence would be lawful, he acknowledged under questioning from the judge at the hearing that "you [the judge] had indicated that you believed [that a 2184a sentence could be imposed] was not the fact; you had said you didn't think it was a legal sentence."

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* The Circuit Court in Mosher also held that the plea was invalid because the defendant had been denied effective assistance of counsel. For this ground as it applies to the facts of this case, see Pt. II, infra.

(A-103). Yet, despite the court's rather clear expressions, the lawyer totally misrepresented the situation to his clients and their parents.

The letter which the judge had discarded as irrelevant was presented by the attorney to Mrs. Guglielmelli with the eager assertion, "this is it; this is what we have been waiting for" (A-123). He never once even hinted to his clients that the judge felt a reformatory sentence was illegal, but rather argued persuasively "You never heard of such a thing, that a judge would go out so far to try to help the boy...there is a good chance, in view of his good background, he might get such a sentence" (A-104). In ignorance of the true tenor of what the judge had said, and in reliance on the attorney's false picture of the judge's attitude, the appellant and his co-defendant, and both their families, were convinced that there was a "good chance" for a five-year maximum term. In reliance, Ciappetta pleaded guilty and, of course, received the mandatory term.

The present case is thus virtually indistinguishable from Mosher. There, the lawyer misrepresented a judge's sentence promise. Here, the lawyer misrepresented the judge's view on the legality of a sentencing alternative, where the viability of the sentencing alternative was crucial to the defendant's choice to plead or stand trial. In both cases the plea was clearly unknowing and involuntary.

The district court rejected appellant's reliance on Mosher (A-77):

> Petitioner's reliance on Mosher is misplaced, since his claim is not one founded on a judge's promise, but rather seen in a light most favorable to petitioner a misrepresentation as to the trial judge's view of the availability of a sentencing alternative. In the court's view, such misrepresentation cannot be equated with a promise of a minimum or lenient sentence.

This reasoning is inapposite. The lawyer's misrepresentation led appellant to believe that an alternative sentence was available, in the judge's view, which was not. Certainly had appellant been told the judge's view of the law conflicted with that of the lawyer, he would have abandoned hope of receiving a reformatory term. Thus, his plea lacked a knowing and voluntary character because of this misrepresentation just as it would have had the lawyer falsely represented a judge's promise. The subjective effect on the appellant is the same and it is his state of mind that is central to the inquiry here. Thus, as a result of this misrepresentation, the appellant's plea violated due process.

POINT III.

THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE TIME HE PLEADED

In Mosher the court also held that the lawyer's misrepresentation to his client denied him the effective assistance of counsel. (Id. at 1348). The same result follows from the facts here. Not only did appellant's attorney misrepresent the judge's view on the legality of a §2184a sentence, thus breaching his duty as counsel to represent his client faithfully, but in a

similarly egregious fashion his insistence upon the viability of the sentencing alternative unfortunately fell below the standard expected of counsel. For the attorney did not merely make an erroneous estimate regarding the sentencing alternative, nor could his assertion in this regard be the result of misanalyzing an abstruse or complex legal problem. Rather, the attorney either was not aware or chose to disregard that §2184a was, on its face, inapplicable to a second degree murder plea, since it excluded crimes punishable by life sentences. In either event, the representation accorded was completely inadequate. Certainly where a lawyer in effect bases his whole case on one statute, he should at least be under the obligation of knowing and correctly representing to his clients the crystal clear words of that statute. This is a bare minimum of effective assistance of counsel. By convincing the defendants and their families that a plainly unavailable sentencing alternative existed, counsel here failed to exercise a standard of care which must necessarily be a requisite for rendering effective legal representation. Anything less self evidently turns the proceedings into a mockery.

Indeed, the district court here found the attorney's misadvice inexplicable (A-79):

> The court can find no logical explanation for counsel's failure to appreciate the impossibility of a reformatory sentence in light of a plea of guilty to murder in the second degree.

In light of this finding it cannot be contended that

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 75-2010

UNITED STATES ex rel. Nancy Rosner, on behalf of

FRANK CIAPPETTA

Appellant

v.

WARDEN, Sing Sing Prison, Ossining, New York

Appellee

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave Brooklyn, N.Y.

That on the 14th day of March, 1975, deponent served the within Brief and Appendix upon Louis J. Lefkowitz, Attorney General of the State of New York Two World Trade Center New York, N.Y. 10047

Attorney(s) for the Appellee in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 14th day of March 1975

Harold Silberweig

HAROLD SILBERWEIG
Notary Public State of New York
No. 30-8995450
Qualified in Nassau County
Commission Expires March 30, 1976

the attorney's misadvice was an ordinary error any competent attorney might make in interpreting the law. Indeed, in a plea proceeding, one of counsel's chief functions is to explain the range of sentencing possibilities to his client. Inexplicable and absurd misadvice such as this certainly deprived appellant of the effective assistance of counsel.

CONCLUSION

For all of these reasons, this Court should direct the district court to issue the writ of habeas corpus and order appellant released from custody.

Respectfully submitted,

ROSNER, FISHER & SCRIBNER
Attorneys for Appellant